No. 90-996

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

COLORADO INTERSTATE GAS COMPANY,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY BRIEF OF PETITIONERS

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1. Respondents' arguments (NGPL Opp. 9-10) that the Tenth Circuit's opinion does not shift the burden of persuasion in a manner contrary to Section 5(a) of the Natural Gas Act ("NGA"), 15 U.S.C. § 717d(a), and the decisions of other circuit courts of appeals is answered fully by the Tenth Circuit's own opinion. The court of appeals first acknowledged that the Commission and NGPL had the "*initial* burden of proof" and that the Commission's discussion of the evidence against CIG's minimum bill was "rather meager." Pet. App. 7a (emphasis added).[1] In the same sentence, the court explains

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[1]Opinion Nos. 290 and 290-A held simply that "CIG has not referred to any record evidence that [NGPL's] cutbacks caused or will cause particular minimum bill or take-or-pay obligations to be incurred." Pet. App. 77a. In fact, however, CIG presented record evidence demonstrating the inevitability of take-or-pay liability resulting from any significant reduction in takes by its customers. See Pet. 15 n.12. CIG also cited record evidence demonstrating

why that meager effort was nevertheless sufficient to render the Commission's decision unreasonable or arbitrary; "the agency was entitled to rely on the presumption of anticompetitiveness established in *Transcontinental Gas Pipe Line Corp.*, 40 FERC ¶ 61,188 at p. 61-589-90 (1987)" ("*Transco*"). *Id.*

Only after explaining that administrative agencies are entitled to rely upon such presumptions and describing the ruling in *Transco* did the court offer the sentence behind which respondents seek shelter: "In the proceeding below, *at least ostensibly*, [the Commission] relied not so much on the established presumption as on the arguments made by NGPL." Pet. App. 8a (emphasis added). But the arguments made by NGPL, as the Commission itself observes, rested on nothing more than "sound theory." U.S. Opp. 8 (quoting Pet. App. 9a). There was nothing specific to this case that satisfied the Commission's and NGPL's ultimate burden of persuasion.

Indeed, the record could not have more plainly reflected that the minimum bill had no actual anticompetitive effect on NGPL's purchasing decisions. NGPL was purchasing no gas from CIG and instead was buying it from other suppliers at higher prices than CIG was charging. NGPL also had declined to reduce its nomination levels, and thereby the amount of payment made on its minimum bills, when CIG offered that opportunity in 1984. The

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that NGPL had reduced its takes to zero and did not plan to take any more of CIG's gas. Request for Rehearing of Opinion No. 290 at 9. CIG also argued in its request for rehearing that it had coupled its minimum bill to its only major partial requirements customer, NGPL, because NGPL was the only major customer who could swing off and cause CIG to incur take-or-pay costs. *Id.* And CIG named one of the pipelines to which it was paying those costs as a result of NGPL's purchasing practices (Northwest Pipe Line Corp.). *Id.* Given that the Commission and the court of appeals were to shift the burden of proof to CIG only after the hearing closed, it was striking how much evidence CIG in fact produced which justified its particular minimum bill.

court of appeals rejected the Commission's challenge to this rebuttal evidence as "unsubstantiated" and "admit[ted] to being somewhat puzzled by NGPL's purchasing practices and sympathetic to the argument that the minimum bill is not discouraging NGPL from purchasing gas from suppliers other than CIG." Pet. App. 10a-11a.[2] Nevertheless, the Court upheld the Commission's orders and did so solely on the basis of its mistaken understanding of the operation of the *Transco* presumption.[3]

2. Respondents next contend that the asserted conflict between the Tenth Circuit's opinion here and the D.C. Circuit's opinion in *Transcontinental Gas Pipe Line Corp.* v. *FERC*, 907 F.2d 1211 (1990) ("*Transcontinental Gas Pipe Line*") is insignificant. In fact, however, the conflict concerns the often dispositive difference between requiring the proponent of a minimum bill to adduce evidence to demonstrate a "specific connection" between a minimum bill and take-or-pay liability incurred versus requiring only a circumstantial showing that reductions in demand by major partial requirements customers are likely to result in take-or-pay liability. See Pet. 13-16; *Tennessee Gas Pipeline Co.* v. *FERC*, 871 F.2d 1099, 1105-06 (D.C. Cir. 1989) (court accepted

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[2] The court found an answer to its puzzlement, however, in the testimony of an NGPL witness stating that "other factors besides price motivate a gas company's choice of supplier." Pet. App. 11a. Yet that justification is nowhere cited or present in the Commission's or the ALJ's rulings. As explained in the petition (Pet. 12 n.10), the Tenth Circuit's holding is a patent violation of this Court's holding in *SEC* v. *Chenery Corp.*, 332 U.S. 194, 196 (1947) and is an additional ground supporting summary reversal and remand.

[3] It is surprising that NGPL rests its defense exclusively upon the argument that the Court and Commission did not rely upon any presumption. See NGPL Opp. 11-12. The Commission itself is not so confident and argues that a post hoc shift in the burden of proof based on a presumption is permissible. See U.S. Opp. 8-10. Although the Commission's argument is incorrect (see *infra* pp. 5-8), at least the Commission deals with the issue as it is presented by the opinion below. NGPL simply wishes the issue away.

Tennessee Gas's showing that it was potentially exposed to great take-or-pay liability and that the minimum bill was "necessary in order for Tennessee's overall rate structure to be just and reasonable").

Of even greater significance, however, is the fact that the two circuit courts look to different *parties* for justification of the Commission's action. The Tenth Circuit looks to the proponent of the minimum bill for specific evidence in support of the bill, thereby completely relieving the Commission of its statutory duty, under NGA § 19(b) (15 U.S.C. § 717r(b)), to support its findings of fact with substantial evidence. See Pet. App. 20a. The Tenth Circuit's procedure, wholly lacking in statutory authority, thus allows something akin to summary judgment in the regulatory realm; in response to a Commission assertion that there are no "material facts" in evidence, a pipeline must adduce evidence which demonstrates the specific connection between its minimum bill and its take-or-pay liability or face a summary "alteration" of its existing rate structure. In *Transcontinental Gas Pipe Line*, however, the D.C. Circuit rejected such an approach.

Faced with evidence in all relevant respects similar to that which CIG presented here,[4] the D.C. Circuit faulted *the Commission* for having cited "no record evidence." 907 F.2d at 1214. The Commission, it said, must explain

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[4] Contrary to respondents' attempts to eliminate the conflict by distinguishing the facts of *Transcontinental Gas Pipe Line*, the fact remains that like Transco, CIG demonstrated here that it had "coupl[ed] the bill to those customers who had caus[ed] the liability," 907 F.2d at 1214, by the simple device of showing that NGPL was CIG's only minimum bill customer because it was the only major partial requirements customer who could swing off the system and thereby cause take-or-pay liability. See Request for Rehearing of Opinion No. 290 at 9. Respondents do not explain what additional proof would be necessary. But if the standards had not been changed retroactively, it is quite likely that CIG could have offered more specific proof of the effect of NGPL's "puzzling" purchasing on CIG's take-or-pay exposure.

its ruling on the basis of "substantial evidence." *Id.* (citing NGA § 19(b)). No such requirement was imposed by the Tenth Circuit, which faulted CIG rather than the Commission for the same error. See Pet. App. 19a-20a ("the 'facts' relied on by CIG are remarkably skimpy"). The conflict therefore is neither insignificant nor illusory, as respondents alternatively suggest. NGPL Opp. 10. It is instead a fundamental difference concerning how reviewing courts will treat the Commission's obligation to justify its decisions to alter existing rate structures—structures which, by their very existence, have previously been found just and reasonable.[5] A conflict of this order between these two circuits warrants resolution by this Court.

3. Respondents' arguments in no way erase the court of appeals' most fundamental error—its bold declaration that "the agency was entitled to rely on the presumption

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[5] In its opposition, the Commission suggests that the Tenth Circuit's ruling is consistent with other rulings of the D.C. Circuit requiring that the proponent of a minimum bill "demonstrate that a contested minimum bill is 'specifically designed to achieve [one of the stated remedial ends], but nothing more.'" U.S. Opp. 8 n.7 (quoting *Panhandle Eastern Pipe Line Co.* v. *FERC*, 881 F.2d 1101, 1113 (D.C. Cir. 1989)). The *Panhandle* opinion, however, relies upon *Mississippi River Transmission Corp.* v. *FERC*, 759 F.2d 945, 950 (D.C. Cir. 1985). There, the court explained that the above quoted standard applied to a pipeline's *initial* proposal of a minimum bill, not a subsequent challenge to that minimum bill once in place. 759 F.2d at 950. In contrast, the D.C. Circuit's opinions reviewing Commission rulings eliminating existing minimum bills criticize the Commission for "its narrow technical focus on the fact that minimum bills are an imperfect mechanism for tracking the source of take-or-pay liability. The bigger picture strongly suggests that the specter of take-or-pay obligations . . . requires [pipelines] to devise some pricing strategy for recoupment when demand falls." *Tennessee Gas*, 871 F.2d at 1106. The Tenth Circuit's opinion here, however, perpetuates this flawed "narrow technical focus." See Pet. App. 20a.

of anticompetitiveness established in [*Transco*]." Pet. App. 7a. As explained at Pet. 16-18, that declaration, without any recognition of the retroactivity issue thereby created, is such a patent violation of this Court's rulings in *NLRB* v. *Food Store Employees*, 417 U.S. 1, 10 n.10 (1974) and *Chevron Oil* v. *Huson*, 404 U.S. 97, 106-07 (1971),[6] that the matter does not require plenary review and can be properly resolved by vacating the judgment and remanding to allow CIG an opportunity to present its case in light of the proposed retroactive application of the Commission's presumption.

Private respondents maintain that the application of the *Transco* ruling was not technically "retroactive" because the Commission issued its *Transco* decision while CIG's minimum bill was pending before the Commission. NGPL Opp. 12. That argument, however, ignores the problem that the presumption created in *Transco* fundamentally changed the evidentiary burden to be borne by proponents of minimum bills at the *hearing stage* of the proceedings. Here, pursuant to 18 C.F.R. § 385.510 (1990), the record had closed in November 1985, a full two years before the Commission's *Transco* decision. In addition, by its own terms the *Transco* ruling applied only to *future* evidentiary hearings. 40 FERC at p. 61,590.[7] Accordingly, the court of appeals' reliance on

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[6] See also *Shell Oil Co.* v. *Andrus*, 591 F.2d 597, 605 (10th Cir. 1979), *aff'd*, 446 U.S. 657 (1980) (citing *Logan* v. *Davis*, 233 U.S. 613 (1914)).

[7] In *Transco*, the Commission expressed its concern that, given the operation of its new presumption, Transco "has not had an adequate opportunity to justify its minimum bill," and rejected the recommendation of the ALJ to vacate the minimum bill. 40 FERC at p. 61,590. The Commission's proper concern for Transco's interests and application of principles of fundamental fairness in that case stand in stark contrast to the arguments put forth in the briefs here. See U.S. Opp. 10, NGPL Opp. 12. Respondents contend that CIG should have been aware two years earlier that it bore the burden not only of rebutting the Commission's claims

that ruling meant nothing less than the retroactive application of what, in the Commission's mind, was a presumption to be applied prospectively only.

Respondents' alternative attempt to justify the court of appeals' retroactive application of the Commission's presumption against minimum bills only hurts their cause. Respondents argue that the court of appeals' retroactive application should be permitted in light of the fact that the regulatory change was foreseeable when CIG was before the ALJ and that CIG knew its minimum bill would be at issue. But that same argument was rejected by this Court in *Chevron Oil*: "We should not indulge in the fiction that the law now announced has always been the law and, therefore, that those who did not avail themselves of it waived their rights." 404 U.S. at 107 (quoting *Griffin* v. *Illinois*, 351 U.S. 12, 26 (1956) (Frankfurter, J., concurring)). Respondents, however, indulge in precisely that fiction.

Moreover, respondents' argument simply goes to one of the principle issues identified by this Court as relevant to a retroactivity determination: Whether the new ruling "could produce substantial inequitable results." *Chevron Oil*, 404 U.S. at 107. Thus, respondents' claim that CIG was not prejudiced defies common sense. Given the legal standards in effect at the time, CIG properly concluded that it was not necessary to present extensive affirmative evidence concerning the specific effect of CIG's minimum bill on NGPL or of NGPL's purchasing practices on CIG. See *Transwestern Pipeline Co.*, 36 FERC ¶ 61,174 at p. 61,439 (1986) (Opinion No. 238-A) (the burden of production rested with Transwestern to show that its minimum bill was "necessary to achieve an objective meriting recognition under the antitrust laws or the Natural Gas Act") (citing *City of Florence*

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against its minimum bill, but also of preparing affirmative evidence to support its bill under standards more strict than required even today in the D.C. Circuit. See *supra* note 5.

v. *Tennessee Gas Pipeline Co.*, 25 FERC ¶ 61,314 at p. 61,714 (1983)). In circumstances involving far less glaring changes in approach, this Court has required a remand for a specific determination of whether the record should be reopened. See *City of Canton* v. *Harris*, 489 U.S. 378, 392 (1989).[8]

In sum, by vacating the decision below, the Court will permit the retroactivity issue to be fairly resolved. In addition, this course will set aside the Tenth Circuit's abdication of its reviewing responsibilities by refusing to hold the Commission to Congress's dictates in Section 5(a) and 19(b) of the NGA, and by its acceptance of an entirely post hoc justification by the Commission. The result of this wholesale shifting and removal of burdens on the part of the court of appeals, together with its willingness to look beyond the Commission's rulings for grounds for affirmance, has been to render the hearing process a meaningless prologue to the Commission's later declarations. This Court therefore should act to restore the integrity of that process and the matter, at a minimum, should be reopened to allow CIG a fair opportunity to present its case.

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[8] In any case, respondents' contentions that no prejudice befell CIG because it could have anticipated the new change in policy are incorrect. See Pet. 18 & n.15.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the petition for a writ of certiorari should be granted, and the judgment vacated so that the Commission, in the first instance, can address the retroactivity issue after a full hearing.

Respectfully submitted,

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